92-1879

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PLUMBERS LOCAL UNION NO. 94 AFL-CIO

Petitioner

-vs-

KOKOSING CONSTRUCTION CO., ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STARK COUNTY,
OHIO, FIFTH APPELLATE DISTRICT

APPENDIX

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EDITOR'S NOTE

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

PLUMBERS LOCAL UNION NO. 94	:	
Plaintiff-Appellant	:	
-vs-	:	
	:	NO. 88AP-1047
OHIO DEPARTMENT OF INDUSTRIAL RELATIONS	:	(REGULAR CALENDAR)
Defendant-Appellee	:	

D E C I S I O N

Rendered on March 29, 1990

GREEN, HAINES, SGAMBATI, MURPHY & MACALA, CO., L.P.A., MR. RONALD G. MACALA and MR. RANDALL VEHAR, for appellant.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, MR. TIMOTHY J. BOJANOWSKI and MR. WILLIAM M. MATTES, for appellee.

APPEAL from the Ohio Court of Claims.

BOWMAN, J.

On August 4, 1988, appellant, Plumbers Local Union No. 94 filed a

complaint for declaratory and injunctive relief in the Ohio Court of Claims seeking to have the Court of Claims order appellee, the Department of Industrial Relations, to designate and classify certain work on the city of Canton waste water treatment project as that of plumbers' work. On September 6, 1988, appellee filed a motion to dismiss pursuant to Civ. R. 12(B)(1) and (6). Appellant filed a memorandum in opposition to appellee's motion and thereafter, appellee filed a response to appellant's memorandum in opposition.

On October 13, 1988, the Court of Claims granted appellee's motion to dismiss and held:

> "***In view of plaintiff's requested relief, the legal relations among the parties, and the statutory directives within R.C. Chapter 4115, I find that an equitable remedy in

the form of declaratory judgment and injunction is inappropriate and contrary to law.

Plaintiff's remedy lies in one of two arenas, to wit: the administrative appeal process of R.C. 4115.15, or in a writ of mandamus.

"This court cannot construe the complaint as one in mandamus because mandamus will not operate against a state agency. ***Furthermore,*** this court is without the authority to issue extraordinary writs.***

"Construing the material allegations within the complaint most favorably for plaintiff leads the court to conclude that defendant's***motion to dismiss is well-taken.****"

Appellant now brings this appeal and asserts the following assignments of error:

"1. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S REQUEST FOR DECLARATORY RELIEF.

"2. THE COURT OF CLAIMS ERRED IN DISMISSING APPELLANT'S REQUEST FOR INJUNCTIVE RELIEF.

"3. THE COURT OF CLAIMS ERRED IN HOLDING THAT APPELLANT'S REMEDY LIES

IN AN ADMINISTRATIVE APPEAL UNDER O.R.C. SECTION 4115.16."

Appellant's assignments of error are related and will be considered together. In these assignments of error, appellant asserts that the trial court erred in dismissing its request for declaratory and injunctive relief and in holding that appellant's remedy was an administrative appeal pursuant to R.C. 4115.16.

R.C. 2721.02 provides that a court may declare rights, status and other legal relations whether or not further relief is or could be claimed. An action for declaratory judgment may be entertained by a court, in the exercise of its sound discretion, where a justiciable controversy exists between adverse parties, and speedy relief is necessary to the preservation of the rights which may otherwise be impaired or

lost. Burger Brewing Co. v. Liquor Control Comm. (1973), 34 Ohio St.2d 93.

R.C. 2727.02 addresses the causes for an injunction and states:

> "A temporary order may be granted restraining an act when it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part of it, consists in restraining the commission or continuance of such act, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, threatens or is about to do, or is procuring or permitting to be done, such act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual."

The granting of declaratory relief and the issuance of an injunction are matters of judicial discretion and, absent an abuse of discretion by the trial court, an appellate court is not permitted to question the trial court's

decision to deny or grant such relief. Control Data Corp. v. Controlling Board (1983), 16 Ohio App.3d 30. See, also, Perkins v. Quaker City (1956), 165 Ohio St. 120; Bilyeu v. Motorists Mut. Ins. Co. (1973), 36 Ohio St.2d 35. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Beacon Journal Pub. Co. v. Stow (1986), 25 Ohio St.3d 347.

In this case, the trial court held that appellant's remedy was either an administrative appeal, pursuant to R.C. 4115.16, or in a writ of mandamus. The court then correctly stated that the Court of Claims is without authority to grant relief in the form of a writ of mandamus. Rosso v. Dept. of Adm. Serv. (1982), 4 Ohio App.3d 312.

This court finds that the trial court did not abuse its discretion in its decision. The trial court correctly determined that appellant had a remedy available to it via an administrative appeal. While the fact that appellant may have had another remedy available to it does not prevent the trial court from granting appellant's request for declaratory and injunctive relief, Gannon v. Perk (1976), 46 Ohio St.2d 301; see, also, Arbor Health Care Co. v. Jackson (1987), 39 Ohio App.3d 183; and Civ. R. 57, such a decision rests within the sound discretion of the trial court. Accordingly, appellant's three assignments of error are not well-taken and are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

REILLY, P.J., and McCORMAC, J., concur.

Filed December 30, 1991
IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938-OC
Plaintiff	:	JUDGE HAAS
-vs-	:	
KOKOSING CONST. CO., ET AL.	:	JUDGMENT ENTRY
Defendants	:	

This matter came on for consideration on the motion for summary judgment filed by the defendant, Kokosing Construction Company, the motion for summary judgment filed by the City of Canton, the motion for summary judgment filed by Laborers' Local 1015, and the motion for partial summary judgment filed by plaintiff, Plumbers Local Union No. 94. The Court finds the motions for summary judgment filed by defendants Kokosing Construction Company, the City of Canton and Laborers'

Local 1015 to be well taken and hereby sustains the same. The Court finds the motion for partial summary judgment filed by the plaintiff, Plumbers Local Union No. 94, to be not well taken and hereby overrules the same.

In May, 1987, the City of Canton advertised and solicited bids for the construction of certain improvements to its water pollution control center (the "project"). The project was separated into four contracts: general construction, heating, ventilating and air conditioning installation, plumbing installation, and electrical installation. The defendant, Kokosing, submitted a bid on the general construction portion of the project. On May 27, 1987, the City of Canton and Kokosing entered into a general construction contract for the project.

The contract was subject to the state prevailing wage law, O.R.C. Chapter 4115.

The plaintiff asserts that wages paid pursuant to the contract by Kokosing were in violation of the prevailing wage law and that said work was plumbing work and not laborer's work. The Court finds no material issue of fact in controversy concerning the fact that Kokosing did pay the prevailing wage rate for laborers for the work that was performed and did not pay the plumbers' rate for said work. The Court finds that the issue before the Court is a work jurisdiction issue which is preempted by the National Labor Relations Act.

Having found that the issue as asserted by the plaintiff is preempted by the National Labor Relations Act, this Court also finds that the claim of the

plaintiff for wages not paid in compliance with the prevailing wage law, is barred by the two year statute of limitations. In the present case, the project was completed on or about September 1, 1988, and the within action was filed on November 13, 1990. The Court finds that Section 2305.11 is controlling.

Additionally, this Court finds that the action of the plaintiff for declaratory relief is moot in that the project has been completed since September, 1988. The plaintiff admits that it is not attempting to obtain work for members of its union, but rather is seeking to insure that those laborers who did perform the work are paid the appropriate prevailing wage. The plaintiff, in essence, is attempting to obtain a precedent by obtaining a

decision that the type of work performed pursuant to the contract between the City and Kokosing should be paid at the prevailing wage for plumbers should a similar situation occur in the future. This Court is not inclined to issue a ruling prospective in nature whereby different contracts with different parties and different contract specifications may well be involved. There is no actual controversy in the present case which needs to be adjudicated. The contract has been completed for some period of time and the claim for prevailing wages is barred by the statute of limitations.

Additionally, this Court finds no basis to enter a ruling for declaratory relief against the City based on the allegations of the plaintiff that the

City is inclined to bid projects in the future in a similar fashion to the procedure used in the case sub judice. Given the multitude of factors which most certainly would be different in the future, this Court finds that it would be unduly entering into an area of uncertainty and speculation to make such a ruling.

For the foregoing reasons, the motion for summary judgment filed by the contractor, Kokosing, the City of Canton, and the Laborers' Union is hereby sustained, Plumbers Local Union No. 94 is hereby overruled.

It is therefore Ordered, Adjudged and Decreed that judgment is hereby granted in favor of the defendants, Kokosing Construction Company, the City of Canton, and Laborers' Union No. 1015 on all

claims of the plaintiff, Plumbers' Local Union No. 94, on its amended complaint and the action is hereby dismissed at plaintiff's costs.

JOHN G. HAAS, JUDGE

Copies to:
Atty. Randall Vehar
Atty. Roger Sabo
Atty. William Hamann
Atty. Lawrence Oberdank

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED TO THE EXTENT THAT IT DENIED, OR OTHERWISE DISMISSED, THE PIPEFITTERS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS CLAIMS BROUGHT PURSUANT TO O.R.C. CHAPTER 4115 AND/OR O.R.C. SECTION 153.50, AND FURTHER ERRED BY FINDING THAT KOKOSING PAID THE APPROPRIATE PREVAILING WAGE FOR THE PLUMBING AND PIPEFITTING WORK PERFORMED BY THE LABORERS.

ASSIGNMENT OF ERROR NO.2:

THE TRIAL COURT ERRED BY FINDING THAT THE ISSUES BEFORE IT WERE WORK JURISDICTIONAL ISSUES PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT ERRED BY APPLYING AND/OR MISAPPLYING A TWO (2) YEAR STATUTE OF LIMITATIONS AND/OR BY APPLYING O.R.C. SECTION 2305.11 TO THE CLAIMS BROUGHT PURSUANT TO O.R.C. CHAPTER 4115, AND/OR SECTION 153.50.

ASSIGNMENT OF ERROR NO. 4:

THE TRIAL COURT ERRED BY DISMISSING THE PREVAILING WAGE CLAIM AGAINST THE CITY

WHEN THE APPELLEES FAILED TO ADEQUATELY AND FULLY SUBSTANTIATE ITS AFFIRMATIVE STATUTE OF LIMITATIONS DEFENSE.

ASSIGNMENT OF ERROR NO. 5:

THE TRIAL COURT ERRED BY FINDING THAT THE REQUEST FOR DECLARATORY RELIEF ON THE PREVAILING WAGE CLAIM WAS MOOT.

ASSIGNMENT OF ERROR NO. 6:

THE TRIAL COURT ERRED BY DISMISSING THE PIPEFITTERS' REQUEST FOR DECLARATORY RELIEF AGAINST THE CITY OF CANTON ON THE O.R.C. SECTION 153.50 CLAIM WITHOUT ADDRESSING THE MERITS OF THAT CLAIM.

ASSIGNMENT OF ERROR NO. 7:

THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE CITY OF CANTON WAS REQUIRED AND/OR WILL BE REQUIRED IN THE FUTURE TO COMPLY WITH O.R.C. SECTION 153.50.

ASSIGNMENT OF ERROR NO. 8:

THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE CITY DID NOT COMPLY WITH THE REQUIREMENTS OF O.R.C. SECTION 153.50.

ASSIGNMENT OF ERROR NO. 9:

THE TRIAL COURT ERRED BY FAILING TO STRIKE PARAGRAPH NINE (9) OF THE

AFFIDAVIT OF DANIEL WALKER DATED NOVEMBER 19, 1991.

ASSIGNMENT OF ERROR NO. 10:

THE TRIAL COURT ERRED BY FAILING TO GRANT A DEFAULT JUDGMENT AGAINST THE LABORERS' UNION.

Dated September 28, 1992

IN THE COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PLUMBERS LOCAL UNION NO. 94 :	CASE NO. CA-8865
Plaintiff :	
-vs- :	
KOKOSING CONST COMPANY, ET AL:	JUDGMENT ENTRY
Defendants:	

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

_____

_____

_____

JUDGES

Filed: September 28, 1992
COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PLUMBERS LOCAL UNION NO. 94, AFL-CIO	:	JUDGES: Hon. Norman J. Putman, P.J.
	:	Hon. Iren B.
Plaintiff	:	Smart, J.
	:	Hon. William B.
-vs-	:	Hoffman, J.
	:	
KOKOSING CONST. CO., ET AL.	:	CASE NO. CA-8865
	:	O P I N I O N
Defendants	:	

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. 90-1938-OC

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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SMART, J.

This is an appeal from a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of defendants-appellees, Kokosing Construction Company (Kokosing), the City of Canton (Canton), and Local 1015, Laborers International Union of North America, AFL-CIO (the laborers union), and against plaintiff-appellant, Plumber's Local Union No. 94 (appellant). The trial court found that the dispute between the parties is a work jurisdiction issue which was preempted by the National Labor Relations Act, that it was barred by the statute of limitations, and was at least partially moot.

Appellant assigns ten errors to the trial court which, because of their

length, are attached and incorporated herein by reference.

Appellant has not complied with Local App. R. 4(D), which states:

> ...The brief of appellant shall contain... where a summary judgment is appealed, a statement on a separate page following the assignments of error, declaring whether the claim is that the judgment is inappropriate on the undisputed facts or that a genuine dispute exists as to a material fact or facts, coupled with a separate statement of a specific fact issue or issues claimed in the trial court to have been material or genuinely disputed...Appellant's failure to comply with these rules...is failure to prosecute the appeal for which dismissal may be entered sua sponte....

We prefer to address this appeal on its merits. Appellant appears in its brief to argue that the trial court's summary judgment is inappropriate on the undisputed facts and as a matter of law. The trial court's judgment entry

articulates the following facts without challenge from appellant:

In May, 1987, the City of Canton advertised and solicited bids for the construction of certain improvements to its water pollution control center. This project was separated into four contracts: a general construction contract, a heating, ventilating and air conditioning contract, a plumbing contract, and an electrical contract. Kokosing submitted a bid on the general construction portion of the project. On May 27, 1987, Canton and Kokosing entered into a general construction contract for the project. This contract was subject to the state prevailing wage law governed by R.C. Chapter 4115.

I & II

Appellant's first assignment of error urges that the trial court committed

reversible error in overruling its motion for partial summary judgment. Obviously a trial court can never commit reversible error in overruling a motion for summary judgment because such a judgment is interlocutory and capable of correction by the trial court prior to or upon the entry of final judgment.

The basic premise underlying all of appellant's claims and causes of action is that the work that Kokosing's laborers performed as advertised by Canton, awarded to Kokosing, and performed by the laborers union, was improperly characterized as labor, when in fact it should have been characterized as plumbing work. Thus, appellant's claim that although Kokosing paid its workers the prevailing laborer wage, this nonetheless violated the prevailing wage

statutes because the workers who performed these jobs should have been paid the higher plumbers prevailing rate. Without this basic premise, all of appellant's arguments fall.

As the trial court correctly found, the issue of whether the work performed here was plumbing or general labor is preempted by the National Labor Relations Act. Thus, the trial court lacked jurisdiction to make the findings that appellant has called for, namely that this was plumbing work that should have carried with it plumbers rates. We add that neither does this court have jurisdiction to make these findings.

29 U.S.C. 158(b)(4)(d) defines as unfair labor practice the forcing or requiring any employer to assign a particular work to employees in a

particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class. 29 U.S.C. 160 directs the National Labor Relations Board to hear and determine disputes in these unfair labor practices. We find that appellant seeks, under a variety of captions and causes of action, to require the employers here to assign this work to employees in plumbing, rather than to employees classified as laborers. This is precisely and squarely within the purview of 29 U.S.C. 158.

R.C. Chapter 4115 governs disputes over what the prevailing rate shall be within the same trade or occupation. It does not apply to disputes over classification of work. Chapter 153

requires separate bids for work materials, and requires the state to pay the prevailing local wage for each trade or occupation. It does not apply to disputes over classifications.

The first and second assignments of error are overruled.

III

The trial court here held that R.C. 2305.11 controls and that a two-year statute of limitations applies. Appellant cites us to Harris v. Atlas Single Ply Systems (1992), 64 Ohio St.3d 171, which held:

> 'Minimum wages,' as used in R.C. 2305.11(A), does not encompass claims based on the failure to pay prevailing wage rates for work on public improvements as set forth in R.C. 4115.10.
>
> Syllabus by the court.

All of appellant's claims pursuant to R.C. Chapters 153 and 4115 presume that

appellant is correct in its basic premise that the work in question was plumbing work and not laborer work. Because we find that the trial court could not adjudicate this preempted federal claim, we find that it is utterly irrelevant whether the trial court found that the statute of limitations had run. Appellant cannot prevail on either of these claims regardless of when the cause of action accrued, or when it filed its complaint.

The third assignment of error is moot.

IV, V, VI, VII & VIII

Appellant does not raise the issue of whether the city complied with R.C. 153.50. Appellant does not challenge the fact that the city did require separate bids for this work. Appellant simply challenges how the work was separated and

categorized. Accordingly, we find that although appellant has couched its complaint in terms of R.C. 4115 and 153, the issues it raises are not properly brought under those provisions, but rather are preempted by the National Labor Relations Act.

The fourth, fifth, sixth, seventh, and eighth assignments of error are overruled.

IX

Paragraph nine of Walker's affidavit states:

> At all times, Kokosing paid its workers on the Project the prevailing wages as required by the contract and Ohio's prevailing wage law.

Appellant urges that this time was a statement of ultimate fact and/or a legal conclusion, and hence not admissible.

Assuming arguendo that appellant is

correct, we find this is not prejudicial error for any number of reasons. First and foremost, a trial court sitting as finder of fact is presumed to consider only admissible evidence, State v. Eubank (1979), 60 Ohio St.2d 183, 187. Here, where the trial court is not finding facts but reviewing the controversy to determine whether or not there are material facts in dispute, the same consideration applies. Further, this matter was not in genuine dispute before the trial court, because the complaint asks the trial court to make a determination that it lacked jurisdiction to make, to-wit, that the laborers had performed plumbing work for which they should be paid plumbers rate.

The ninth assignment of error is overruled.

X

Kokosing joined as party co-defendants the laborers union, whose members actually performed the work in question. Our review of the complaint and amended complaint leads us to conclude that appellant did not pray for any relief from the trial court as to the defendants. Appellant was not prejudiced by the trial court's refusal to enter default judgment. This had no effect on the final outcome herein.

The tenth assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Putman, P.J. concurs.

Hoffman, J. concurs in part
and dissents in part.

_____

_____

_____
JUDGES

IBS/la 0820 0824

HOFFMAN, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur in the majority's disposition of appellant's first, sixth, seventh, ninth, and tenth assignments of error. However, I respectfully disagree with the majority's conclusion that this case is pre-empted by federal labor law.

Under R.C. 4115.16(B), an "interested party" has standing to bring a prevailing wage claim. Though appellant does not stand to realize any pecuniary gain in the instant controversy, it is nonetheless an interested party under the statute. Obviously its interest rests in the bidding of future contracts.

Resolution of prevailing wage cases would seem to often, if not always, tangentially involve "work jurisdiction" questions. However, this tangential involvement should not lead to the

automatic conclusion that state courts lack jurisdiction to resolve the underlying prevailing wage dispute.

The majority and trial court regard appellant's claims as calling of resolution of which employees' union should perform the work. The more appropriate inquiry in a prevailing wage case is which employees' union has performed this specific type of work in the past within the same "locality." This is the essence of a prevailing wage case and distinguishes it from a "work jurisdiction" case.

The trial court need not enter any order directing that the work be awarded to any particular employees' union now or in the future. The trial court must merely determine what amount of wages are to be paid to the employees who performed

the work. I would sustain appellant's second assignment of error.

Likewise I would sustain appellant's third and fourth assignments of error. The statute of limitations found in R.C. 733.60 is clearly not applicable because the relief sought is not to enjoin the performance of a contract. The two year statute of limitations in R.C. 2305.11 is inapplicable because "prevailing wages" is not synonymous to "minimum wages of overtime compensation." Harris v. J.A. Schultz & Son, Inc., (3/30/89), Defiance App. No. 4-87-4, unreported, and Harris v. J.A. Schultz & Son, Inc. (7/17/87), Wood App. No. 86-81, unreported. Though I recognize these two cases involved a different plaintiff, the Ohio Director of Industrial Relations, the same reasoning should apply to a suit brought by any

"interested party." Tango v. Production Machinery Corp. (1/3/89), Lake App. No. CA-13-019, unreported.[1] The six year statute of limitations contained in R.C. 2305.07 would seem more appropriate.

Furthermore, appellant's claim for declaratory judgment was not rendered moot by completion of the project. Still at issue is whether the employees of Kokosing have been fully compensated under the prevailing wage and if ultimately determined adverse to Kokosing, whether the trial court should order the Ohio Director of Industrial Relations Commission prevent further violation.

---

[1] I would reconsider our decision in Harris v. Atlas Single Ply Systems, Inc. (6/25/91), Guernsey App. No. 90-CA-32, unreported.

Appellant's fifth assignment of error should be sustained.

Appellant's suggestion that the trial court's dismissal of its request for declaratory relief versus the appellee City of Canton was error is flawed. Appellant relies upon the fact that the City of Canton took the position that it was not bound at all to comply with R.C. 153.50. This does not mean it will necessarily do so in the future though perhaps so inclined. This issue is not yet ripe as to the City of Canton. The sixth and seventh assignments of error should be overruled.

JUDGE WILLIAM B. HOFFMAN

WBH/la 0909 0911 0922

Dated November 3, 1992

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94, AFL-CIO	:	CASE NO. CA-8865
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. CO., ET AL.	:	JUDGMENT ENTRY
Defendants	:	

Upon application of Plaintiff-Appellant, and for good cause shown, it is hereby

ORDERED that the record in this case be certified to the Supreme Court of Ohio for review and final determination on grounds that the Judgment issued in this case by this Court on September 28, 1992, is in conflict with the Opinion and Judgment issued by the Ninth Judicial District Court of Appeals in Donahue, et

al. v. Cardinal Construction Company, et al., 11 Ohio App.3d 204 (Wayne Co., 1983).

JUDGE

JUDGE

JUDGE

December 2, 1992

Marcia J. Mengel, Clerk of Courts
Ohio Supreme Court
State Office Tower
30 E. Broad Street
Columbus, OH 43266-0419

Re: Plumbers Local Union No. 94 AFL-CIO v. Kokosing Construction Company, et al., Stark County Court of Appeals Case No. CA-8865

Dear Ms. Mengel:

Enclosed for filing is the Judgment Entry dated November 3, 1992, by the Stark County Court of Appeals certifying the above-captioned case to the Ohio Supreme Court as being in conflict with the Opinion and Judgment entered in Donahue, et al., v. Cardinal Construction Company, et al., 11 Ohio App. 3d 204 (Wayne Co. 1983). Also enclosed is Check No. 6451 in the amount of $40.00 for the filing fee in this matter.

By a copy of this letter, I hereby certify that this letter with the attached judgment entry is being served by regular U.S. mail on this same date to the following attorneys of record in this case:

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Attorney for Appellee
City of Canton

Please see that this is filed with the Supreme Court by December 3, 1992, as required by Rule III of the Rules of Practice of the Supreme Court of Ohio.

For your information, on November 24, 1992, this Law Firm also filed a Memorandum in Support of Jurisdiction regarding the same above-captioned case. Consequently, the Supreme Court may well want to give the same case number to these matters regardless of whether the appeal is accepted as a matter of right or as a matter of discretion.

If you have any questions on these matters, please feel free to call me.

Very truly yours,

RANDALL VEHAR
(0008177)

RV/kjd
Enclosures

cc: Lawrence M. Oberdank
Roger L. Sabo
William J. Hamann
Daniel Fonte

Dated December 4, 1992

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. CA-8865
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	JUDGMENT ENTRY
Defendants	:	

Motion for reconsideration overruled.

JUDGE IRENE B. SMART

JUDGE NORMAN J. PUTMAN

JUDGE WILLIAM B. HOFFMAN

THE SUPREME COURT OF OHIO

1993 TERM

TO WIT: FEBRUARY 10, 1993

PLUMBER'S LOCAL UNION NO. 94, AFL-CIO	:	CASE NO. 92-2375
Appellant	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	E N T R Y
Appellees	:	

Upon consideration of the motion for an order directing the Court of Appeals for Stark County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Green, Haines, Sgambati, Murphy & Macala.

(Court of Appeals No. CA8865)

THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1993 TERM

TO WIT: APRIL 14, 1993

PLUMBERS LOCAL UNION NO. 94, AFL-CIO	:	CASE NO. 92-2443
Appellant	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	E N T R Y
Appellees	:	

This cause is pending before the Court on the certification of conflict by the Court of Appeals for Stark County. Upon consideration of appellant's motion for leave to file record and brief instanter,

IT IS ORDERED by the Court that said motion for leave to file instanter be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

Dated April 22, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND/OR A WRIT OF MANDAMUS
Defendants	:	

1. Plaintiff, Plumbers Local Union No. 94 (hereinafter the "Union"), is an unincorporated and bona fide organization of labor, as set forth in Section 4115.03(F)(3) of the Ohio Revised Code, which is authorized to represent employees who perform plumbing and pipefitting work on construction projects that are subject to Chapter 4115 of the

Ohio Revised Code, including the "public improvement" at issue in this case. The Union also exists for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees and industries affecting commerce. As such, the Union is an "interested party" pursuant to Section 4115.01(F)(3) of the Ohio Revised Code.

2. The Union is also an unincorporated association capable of suing on its own behalf and on behalf of those who are its members (many of whom are citizens and/or residents of the City of Canton), or who it otherwise represents pursuant to Section 1745.01 of the Ohio Revised Code.

3. The Union is bringing this action as an incorporated association, as an

"interested party," as a bona fide organization of labor, and on behalf of its members, including those who are citizens or residents of the City of Canton, as permitted by Section 1745.01 of the Ohio Revised Code.

4. Defendant Kokosing Construction Co. (hereinafter "Kokosing") is a corporation licensed to do business and doing business within the State of Ohio with an office at 220 Market Avenue South, Canton, Ohio 44702.

5. Defendant City of Canton is a municipal corporation in Stark County, Ohio, capable of being sued. Robert Smith is the Housing Officer for the City of Canton and, as such, he has been delegated the responsibility to ensure that the City of Canton is in compliance with Ohio's prevailing wage rate and

separate bids laws as set forth in Chapters 4115 and 153 of the Ohio Revised Code. Mr. Smith has an office located at Canton City, Hall, 5th Floor, Canton, Ohio 44702.

6. The City of Canton is a "public authority" as that term is used in Section 4115.03(A) of the Ohio Revised Code and it is required to abide by Section 153.50 of the Ohio Revised Code.

7. On or about September 1, 1987, the City of Canton undertook a project to improve its waste water treatment plant (hereinafter the "Project"). This construction project is a "public improvement" as that term is used in Section 4115.03(C) of the Ohio Revised Code. Consequently, the wages and benefits that are to be paid by contractors and subcontractors, who

performed construction work on this "public improvement," are subject to Ohio's prevailing wage law as set forth in Sections 4115.03 through 4115.16 of the Ohio Revised Code.

8. Pursuant to Section 153.50 of the Ohio Revised Code, the City of Canton had and has a statutory obligation to require separate and distinct proposals to be made for furnishing work for this and other public improvements for each separate and distinct trade or kind of mechanical labor, or employment, required for such improvements.

9. Upon information and belief, the City of Canton has not complied with Section 153.50 of the Ohio Revised Code on other projects, did not comply with Section 153.50 of the Ohio Revised Code on this project, and did not separately

bid the mechanical piping including the fitting, laying, fabricating, or otherwise installing the large and/or complex piping for the Project, but wrongfully included such work within its bid for general construction.

10. Defendant Kokosing received the bid from the City of Canton to be the general contractor on the Project. As part of its agreement with the City of Canton, Defendant Kokosing was contractually and statutorily required to pay its employees (and/or to ensure that the employees of its subcontractors pay its employees) the prevailing wage rates as properly determined under Chapter 4115 of the Ohio Revised Code. The failure of Defendant City of Canton to comply with Section 153.50 affected the ability to

make and/or apply proper wage rates to the Project.

11. Since on or about September 1, 1987, the City of Canton, by and through Kokosing and/or Kokosing's sub-contractors, has performed construction work on the Project. A significant portion of such construction work was of the same type of work, trade, or occupation, that has historically and typically been performed in the Canton locality by plumbers and/or pipefitters represented by the Union. In fact, employees represented by Plaintiff performed such similar work at this same Project during the previous major overhaul, modification, and/or addition at said Project.

12. Chapter 4115 and Section 153.50 of the Ohio Revised Code requires that

the prevailing wages and benefits for the type of work described in the preceding paragraph must be established by the collective bargaining agreements negotiated by the Union throughout the Canton locale (hereinafter the "Prevailing Wage") and that such work may be let only after separate bid proposals are sought, required, and made.

13. By failing to properly advertise, pay, and/or insure payment of the Prevailing Wage to employees performing plumbers-and-pipe-fitters-type work, Defendants and/or their agents and/or subcontractors have not complied with Ohio's prevailing wage and/or separate bid laws, regarding plumbers-and-pipe-fitters-type work, performed at the Canton Project.

14. Because Defendants have failed to comply with Ohio's prevailing wage and/or separate bid laws, the Union and its members and other employees represented by the Union, including those who are citizens or residents of the City of Canton, have suffered severe and irreparable harm.

15. The Union and its members and/or other employees represented by the Union, and/or the interested party (as described in Sections 4115.03(F)(1) and (2) of the Ohio Revised Code) that employs or would have employed persons represented by the Union, unfairly have been placed at a disadvantage in obtaining said work, because said work was performed by other employees at a lower wage/benefit rate than required by Ohio law and at a lower rate than would have been paid to the

Union's members and other employees represented by the Union.

16. The person represented by the Union, who are residents or citizens of the City of Canton, have been harmed since they have not had the advantage of the City fully complying with all applicable laws.

17. Upon information and belief, Defendant City of Canton has not complied with Section 153.50 on other projects. Consequently, there is a reasonable likelihood that it will not comply with these statutory requirements in the future, thereby justifying injunctive relief and/or a writ of mandamus ordering the City to comply with this statute.

18. On or about January 13, 1988, Plaintiff, as an interested party, filed a complaint with the Ohio Director of

Industrial Relations alleging violations of Ohio's prevailing wage laws, which was received by the Department of Industrial Relations by January 29, 1988. More than sixty (60) days have passed since the filing of this Complaint and the Director of Industrial Relations has not ruled on the merits of this Complaint. Consequently, this Court has jurisdiction, pursuant to Section 4115.16(B) of the Ohio Revised Code, to consider this Complaint.

WHEREFORE, Plaintiff demands that this Court:

1. DECLARE, ADJUDGE and DECREE that Defendants have violated Ohio's prevailing wage rate and separate bid laws by not ensuring that the Project was properly advertised or let for bid and/or the prevailing wage was properly paid for

the construction and/or plumbers and pipefitters type of work performed at the Project;

2. Enter an order requiring Defendants, jointly and severally, to compensate those employees and/or persons, who performed construction work at the Canton Project, at the appropriate Prevailing Wage rate;

3. Enter an order and/or writ of mandamus requiring the City of Canton to comply with prevailing wage and/or the separate bid laws in the future;

4. Enter an order directing the Director of Ohio Department of Industrial Relations, pursuant to Section 4115.16(B) of the Ohio Revised Code to take appropriate actions to prevent further violations of Ohio's prevailing wage laws;

5. Enter an award of attorney's fees and costs for Plaintiff pursuant to Section 4115.16(D) of the Ohio Revised Code; and

6. Award such other relief as this Court deems just and proper.

Respectfully submitted,

GREEN, HAINES, SGAMBATI,
MURPHY & MACALA CO., L.P.A.

By _____

RONALD G. MACALA
RANDALL VEHAR
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(38/7/35)

CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing First Amended Complaint for Declaratory and Injunctive Relief and/or a Writ of Mandamus was forwarded by regular U.S. mail, postage prepaid, to ROGER L. SABO and JOHN J. KRIMM, JR., MILLISOR & NOBIL, 41 South High Street, Sutie 2195, Columbus, Ohio 43215, Attorney for Defendant Kokosing Construction Co.; LARRY OBERDANK, OBERDANK & COWAN, 1130 Standard Building, Cleveland, Ohio 44113, Attorney for Laborers Local 1015; and WILLIAM J. HAMANN, City of Canton, 218 Cleveland Avenue, S.W., Canton, Ohio 44702, Attorney for City of Canton, on this 22nd day of April, 1991.

RANDALL VEHAR (0008177)
Attorney for Plaintiffs

Dated: November 12, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	AFFIDAVIT OF ROBERT KRESS
Defendants	:	

I, ROBERT KRESS, being first duly sworn according to law, depose and state as follows:

1. I am President of the Soehnlen Piping Company. I have been involved in the plumbing and pipefitting business for twenty-four (24) years. I have experience in, familiarity with, and expertise in this industry. Frequently, I have been involved in preparing bids

for my company on public projects within the State of Ohio and I have a familiarity with that bidding process.

2. Within our industry, plumbing and pipefitting generally is considered a separate and distinct trade and/or kind of "mechanical" labor, employment, or business.

3. I have been provided and have reviewed the document that is attached hereto and made a part hereof and which is designated as Plaintiff's Exhibit "C," which I understand is from the Smith deposition taken in this case. I understand this document to be a tabulation and comparison of the bids made on the Canton Waste Water Treatment Project, which I understand is at issue in the above-captioned case.

4. Based upon my experience in the industry, it is my professional opinion that the items on Plaintiff's Exhibit "C," which are designated as Item Nos. 11370, 11372, 11376, 11610, 13310, 15061, 15062, 15063, 15100, 15120, 15250, constitute plumbing and pipefitting work and, as such, constitute separate and distinct mechanical labor, employment, or business.

5. If the City of Canton had separately bid the plumbing and pipefitting work and/or the mechanical work, that is described in the previous paragraph, Soehnlen Piping Company would have placed a separate bid for that work. Comparing these particular items from Soehnlen's general bid on this project with the same items on Kokosing's general bid, Soehnlen would have under bid

Kokosing for this plumbing and pipefitting and/or mechanical work.

6. Soehnlen's bid, as reflected in the attached Plaintiff's Exhibit "C," was based on the assumption that Soehnlen would pay its employees the prevailing wages of Plumbers and Pipefitters, as provided for in the labor agreement between Soehnlen and the Plaintiff in this case.

7. Based upon my knowlege of the industry, the wage rates and fringe benefits for members of the Plaintiff are higher than the wage rates and fringe benefits of the members of the Laborers Union, who I understand performed the plumbing and/or pipefitting work at the Canton Waste Water Project for Kokosing.

8. The employees, who would have performed the plumbing and pipefitting

work for Soehnlen if Soehnlen had been awarded the bid to perform such work for the City of Canton, are primarily from Canton and the surrounding area.

9. Based upon my knowledge of the industry, it is my understanding that many, if not indeed most, of Kokosing's employees who performed work at this Project were not from the Canton and surrounding area.

10. I am over the age of eighteen (18) years and, unless otherwise indicated, have personal knowlege of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____

ROBERT KRESS

SWORN TO before me and SUBSCRIBED in my presence, this 12th day of November, 1991.

NOTARY PUBLIC

Dated: December 18, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	SECOND AFFIDAVIT OF ROBERT KRESS
Defendants	:	

I, Robert Kress, being first duly sworn according to law, depose and state as follows:

1. This affidavit is a supplement to my earlier affidavit dated November 12, 1991, in this case.

2. I have reviewed the Supplemental Affidavit of Daniel Walker dated December 12, 1991, that has been submitted in this case.

3. In reference to Paragraph Four (4) of my earlier affidavit submitted in this case, if Soehnlen Piping Company had been permitted to submit a separate bid for the plumbing and pipefitting work described in Paragraph Four (4) of my earlier affidavit, Soehnlen would not have changed its cost estimates for the items that I have described as being mechanical or plumbing and pipefitting items in Paragraph Four (4). Consequently, I still believe that Soehnlen would have underbid Kokosing for the mechanical work if Soehnlen had been permitted to bid separately on this mechanical work. Attached hereto is a true and accurate copy of Tabulation of Bids (Plaintiff's Exhibit "C") that I reviewed and have referred to in preparing both of my affidavits.

4. After Kokosing Construction Company was awarded the general construction contract for the Canton Waste Water Treatment Plant in 1987, Soehnlen offered to Kokosing to perform the mechanical work on this project for the same cost on these items as Soehnlen bid to the City of Canton. Kokosing refused.

5. I am over the age of eighteen (18) and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____
ROBERT KRESS

SWORN TO before me and SUBSCRIBED in my presence, this 18th day of December, 1991.

_____
NOTARY PUBLIC

Dated: April 22, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	**AFFIDAVIT OF DANIEL FONTE**
Defendants	:	

I, DANIEL FONTE, being first duly sworn according to law, depose and state as follows:

1. I am the business agent for the Plaintiff. In this capacity, I have reviewed numerous newspaper advertisements by public agencies soliciting bids for municipal waste water projects, as well as numerous bids for such projects.

2. I am experienced in and knowledgeable about the type of work performed by members of the Plaintiff.

3. I personally observed that the same type of work was performed by contractors of Defendant City of Canton at the Canton Waste Water Treatment Project at issue in this case, that typically is performed by employees represented by the Plaintiff.

4. I have reviewed the newspaper advertisement submitted by Defendant City of Canton in support of its motion for summary judgment, as well as the requirements of Section 153.50 of the Ohio Revised Code. Based upon my experience and knowledge, it is my opinion that the newspaper advertisement does not meet the requirements of Section 153.50 of the Ohio Revised Code and that

the mechanical labor regarding piping and/or the major or complex piping related work, that is typically performed by Plaintiff's members, was not required by the advertisement to be submitted by a separate and distinct proposal, but instead was included within the general construction solicitation for bid.

5. I am over the age of eighteen (18) years and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____
DANIEL FONTE

SWORN TO before me and SUBSCRIBED in my presence, this 22nd day of April, 1991.

_____
NOTARY PUBLIC

Dated: November 22, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	SECOND AFFIDAVIT OF DANIEL FONTE
Defendants	:	

I, DANIEL FONTE, being first duly sworn accordingly to law, depose and state as follows:

1. This affidavit is a supplement to the earlier affidavit I have given in this case. By this affidavit, I reaffirm my previous statements from my earlier affidavit.

2. I was present during the deposition of Theresa Fitchpatrick which

was taken in this case and which I understand is now being filed with this Court. I dispute certain factual contentions made by Ms. Fitchpatrick including, but not limited to, the following enumerated instances.

3. Prior to Ms. Fitchpatrick's deposition, neigher I, nor to the best of my knowledge Plaintiff Local 94, ever received a request from the Ohio Department of Industrial Relations (hereinafter the "ODIR") for information to establish that members of the Plaintiff Local performed the plumbing and pipefitting work on waste water treatment plants, though I have verbally provided such information to ODIR investigators in the past at times before July 13, 1990.

4. Prior to the date of Ms. Fitchpatrick's deposition, neither I, nor to the best of my knowledge anyone else representing the Plaintiff, ever received a written or verbal determinatin on my prevailing wage complaint involving the Canton waste water project at issue in this case (hereinafter the "Complaint"), or the reiteration of that Complaint filed on the Plaintiff's behalf with ODIR by our Attorney Randall Vehar, indicating that a final determination had been made or that our complaints were without merit.

5. During her deposition, Ms. Fitchpatrick stated that she told me of her final decision on my Complaint when she spoke at a Plumbers and Pipefitters convention in Toledo, Ohio. While Ms. Fitchpatrick did speak to a Plumbers and

Pipefitters convention in Toledo, Ohio, on July 13, 1990, she did not give me a final determination on the merits of my Complaint.

6. To the extent that I received any response from ODIR on my Complaint regarding the Project at issue in this case, I received a copy of a 1969 decision by the National Labor Relations Board involving entities who are not parties to this case. While I continually have taken the position that the proceedings that the Plaintiff initiated before ODIR are not work jurisdictional dispute proceedings since the Plaintiff is not and/or was not attempting to obtain the work for its members through this prevailing wage rate proceeding, but merely was attempting to insure, as an interested party, that the

appropriate prevailing wage rates were paid to whichever employees, in fact, performed plumbing and pipefitting work, it has been my impression that ODIR did not want to decide the prevailing wage question because of its mistaken opinion that this was a work jurisdictional dispute.

7. Based upon my knowledge of the industry within Stark County, Ohio, I do not believe that Defendant Kokosing performed "mechanical" plumbing and pipefitting work on a waste water treatment plant within Stark County, Ohio, prior to or during the construction on the Canton Waste Water Treatment Plant in 1987-1988.

8. I am over the age of eighteen (18) and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

_____
DANIEL FONTE

SWORN TO before me and SUBSCRIBED in my presence, this 22nd day of November, 1991.

_____
NOTARY PUBLIC

Dated: December 18, 1991

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

PLUMBERS LOCAL UNION NO. 94	:	CASE NO. 90-1938
	:	JUDGE HAAS
Plaintiff	:	
-vs-	:	
KOKOSING CONSTR. COMPANY, ET AL.	:	THIRD AFFIDAVIT OF DANIEL J. FONTE
Defendants	:	

I, Daniel J. Fonte, being first duly sworn according to law, depose and state as follows:

1. This affidavit supplements my first and second affidavits previously filed in the above-captioned case regarding the Canton Waste Water Treatment Project at issue in this case (hereinafter the "Project").

2. Workers, who are and/or were members of the Plaintiff during relevant times, performed plumbing or pipefitting work at the following waste water treatment plants during the approximate time periods indicated: Alliance Waste Water Treatment Plant, Alliance, Ohio (August 16, 1983, through March 1, 1985); Orrville Waste Water Treatment Plant, Orrville, Ohio (November 23, 1987, through February 10, 1989); Massillon Waste Water Treatment Plant, Massillon, Ohio (November, 1990, through March, 1991); Navarre Waste Water Treatment Plant, Navarre, Ohio (July 16, 1987, through May 5, 1988).

3. Workers, who were or are represented by the Plaintiff, performed process piping work at the projects listed in the previous paragraph as well

as at other construction projects within Stark County, Ohio, during relevant times. The process piping work at these other waste water treatment plants included the same or similar type of work that I saw Laborers perform at the Project, and/or which I have learned during the depositions in this case (all of which I attended) was performed by Laborers at the Project. (I have included the reference to the Orrville project to show that workers represented by the Plaintiff have performed process piping in an adjacent county). This process piping work was performed under and pursuant to the Stark Association of Plumbing, Heating and Cooling Contractors, Inc. and United Association of Plumbers, Pipefitters Refrigeration, Local Union No. 94 (the Plaintiff) labor

agreement dated and effective from May 1, 1986, through April 30, 1989, a true and accurate copy of which already is included in this case as part of Plaintiff's Appendix "5" (hereinafter the "Pipefitters' Agreement").

4. Under the Pipefitters' Agreement with Soehnlen Piping Company in effect during the time that the Canton Waste Water Treatment Plant Project was being performed in 1987-1988, if Soehnlen had performed the mechanical plumbing or pipefitting work, including the process piping work, Soehnlen could not have used more than one apprentice for three (3) journeyman on that Project.

5. Based on my knowledge of the industry, the Laborers' Union does not have an apprenticeship program for plumbing or pipefitting workers.

6. Based upon my review of the payroll records submitted by Kokosing Construction Company during discovery in the above-captioned case regarding the Canton Waste Water Treatment Project, it does not appear that Kokosing utilized any apprentices to perform plumbing or pipefitting work on the Canton Waste Water Treatment Project.

7. Based upon my knowledge of the industry and numerous conversations with various contractors who bid on various construction projects, it is my understanding that contractors do not normally utilize an apprenticeship rate when calculating their projected costs when placing bids for construction projects. Instead, contractors normally assume that they will be paying journeymen's wages since it is not always

clear how many, if any, apprentices will be available when construction actually commences, nor is it clear at the time that bids are being placed the length of time that avoidable apprentices have been apprentices. The length of time that a person has been an apprentice may affect the wage rate that he/she must be paid under the Pipefitters' Agreement.

8. Since the payroll records submitted during discovery by Defendant Kokosing in this case, as well as the Laborers' Union collective bargaining agreement submitted, both suggest that the Laborers do not pay apprenticeship rates and/or did not have apprentices for purposes of performing process piping work at the Canton Waste Water Treatment Project, it is the Plaintiff's position that the possibility, that Pipefitter

apprentices might have performed some of the work at the Project if Soehlen had been awarded the work at issue, is irrelevant. Since no Laborers' apprentices performed work at the Project, then no prevailing rates for apprentices would have to be paid and the Pipefitters' apprenticeship rate would have no applicability. Only the Pipefitters' journeymen rates, which during relevant times were higher for both hourly wages and fringe benefits than the Laborers' hourly and fringe benefits rates, would be applicable for prevailing wage rate purposes.

9. Some of the members of Plaintiff, who would have been referred to perform process piping work for Soehlen Piping Company, if Soehlen had

received the bid on the Project, resided in the City of Canton.

10. I am over the age of eighteen (18) and have personal knowledge of the allegations contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

DANIEL J. FONTE

SWORN TO before me and SUBSCRIBED in my presence, this 18th day of December, 1991.

NOTARY PUBLIC

OHIO REVISED CODE

Section 153.50 Separate bids for work and materials.

An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical

OHIO REVISED CODE SECTION 153.50 CONT.

labor, employment, or business entering into the improvement.

OHIO REVISED CODE

Section 153.51. Contract may not be awarded for entire work.

When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

OHIO REVISED CODE

Section 153.52. Each contract shall be for only one class of labor or material, exceptions.

The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment, or business, or for the furnishing of materials therefore, or both, shall be awarded by the officer, board, or other authority referred to in section 153.50 of the Revised Code, in its discretion, to the lowest responsive and responsible separate bidder therefore, in accordance with section 9.312 [9.31.2] of the Revised Code in the case of any officer, board, or other authority of the state or any public institution belonging thereto, and to the lowest and best separate

OHIO REVISED CODE SECTION 153.52 CONT.

bidder in the case of a county, township, municipal corporation, or school district, or any public institution belonging thereto, and shall be made directly with him or them in the manner and upon the terms, conditions, and limitations as to giving bond or bid guaranties as prescribed by law unless it is let as a whole, or to bidders for more than one kind of work or materials. Sections 153.50 to 153.52 of the Revised Code do not apply to the erection of buildings and other structures which cost less than ten thousand dollars, except as provided in sections 153.02 and 153.03 of the Revised Code.

OHIO REVISED CODE

Section 4115.03. Definitions.

As used in sections 4115.03 to 4115.16 of the Revised Code:

(A) "Public authority" means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions maded in whole or in part from public funds.

(B) "Construction" means any construction, reconstruction,

OHIO REVISED CODE SECTION 4115.03 CONT.

improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

(C) "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by

OHIO REVISED CODE SECTION 4115.03 CONT.

any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority, shall be a "public improvement" as defined herein.

(D) "Locality" means the county wherein the physical work upon any public improvement is being performed.

(E) "Prevailing wages" means the sum of the following:

OHIO REVISED CODE SECTION 4115.03 CONT.

(1) The basic hourly rate of pay;

(2) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program;

(3) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing the following fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in

OHIO REVISED CODE SECTION 4115.03 CONT.

writing to the laborers and mechanics affected:

(a) Medical or hospital care or insurance to provide such;

(b) Pensions on retirement or death or insurance to provide such;

(c) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapters 4121. and 4123. of the Revised Code;

OHIO REVISED CODE SECTION 4115.03 CONT.

(d) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;

(e) Life insurance;

(f) Disability and sickness insurance;

(g) Accident insurance;

(h) Vacation and holiday pay;

(i) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the laborers and mechanics affected;

(j) Other bona fide fringe benefits;

OHIO REVISED CODE SECTION 4115.03 CONT.

None of the benefits enumerated in division (E)(3) of this section may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any of such benefits.

(F) "Interested party," with respect to a particular public improvement, means:

(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

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(3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;

(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.

OHIO REVISED CODE

Section 4115.05. Locally prevailing wage rates to determine minimum contract wage.

The prevailing rate of wages to be paid for a legal day's work, as prescribed in section 4115.04 of the Revised Code, to laborers, workmen, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the

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trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less at any time during the life of a contract for the public work than the prevailing rate of wages then payable for such labor in the locality where the public work is being performed, under or as a result of collective bargaining agreements or understandings between employers and bona fide organizations of labor in force at the date the contract for the public work, requiring the employment of serving laborers, helpers, assistants, or apprentices, was made, and

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collective bargaining agreements or understandings successor thereto.

Apprentices will be permitted to work only under a bona fide apprenticeship program if such program exists and is registered with the Ohio apprenticeship council.

The allowable ratio of apprentices to skilled workers permitted to work shall not be greater than the ratio allowed the contractor or subcontrator in the collective bargaining agreement or understanding referred to in this section under which the work is being performed.

In event there is no such collective bargaining agreement or understanding in the immediate locality, then the prevailing rates of wages in the nearest

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locality in which such collective bargaining agreements or understandings are in effect shall be the prevailing rate of wages, in such locality, for the various occupations covered by sections 4115.03 to 4115.16 of the Revised Code.

The prevailing rate of wages to be paid for a legal day's work, to laborers, workmen, or mechanics, upon any material to be used in or in connection with a public work, shall not be less than the prevailing rate of wages payable for a day's work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used.

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Every contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work shall be paid the prevailing rate of wages provided in this section.

No contractor or subcontractor under a contract for a public work shall sublet any of the work covered by such contract unless specifically authorized to do so by the contract.

Where contracts are not awarded or construction undertaken within ninety days from the date of the establishment of the prevailing rate of wages, there shall be a redetermination of the prevailing rate of wages before the

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contract is awarded. Upon receipt from the director of industrial relations of a notice of a change in prevailing wage rates, a public authority shall, within seven working days after receipt thereof, notify all affected contractors and subcontractors with whom the public authority has contracts for a public improvement of the changes and require the contractors to make the necessary adjustments in the prevailing wage rates.

If the director of industrial relations determines that a contractor or subcontractor has violated sections 4115.03 to 4115.16 of the Revised Code because the public authority has not notified the contractor or subcontractor as required by this section, the public

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authority is liable for any back wages, fines, damages, court costs, and attorneys fees associated with the enforcement of said sections by the director for the period of time running until the public authority gives the required notice to the contractor or subcontractor.

On the occasion of the first pay date under a contract, the contractor or subcontractor shall furnish each employee not covered by a collective bargaining agreement or understanding between employers and bona fide organizations of labor with individual written notification of the job classification to which the employee is assigned, the prevailing wage determined to be

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applicable to that classification, separated into the hourly rate of pay and the fringe payments, and the identity of the prevailing wage coordinator appointed by the public authority. The contractor or subcontractor shall furnish the same notification to each affected employee every time the job classification of the employee is changed.

REVISED CODE

Section 4115.10. Prohibitions.

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project cost of which is fairly estimated to be more than four thousand dollars shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority

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that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference. The employee may file suit for recovery within sixty days of the director of industrial relations' determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable

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thereto may file a complaint in writing with the department of industrial relations upon a form furnished by the department. At the written request of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the director determines there is a

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violation of sections 4115.03 to 4115.16 of the Revised Code and sixty days have elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the director take an assignment of a wage claim pursuant to division (B) of this section.

The director shall bring any legal action necessary to collect any amounts owed to employees and in addition thereto as a penalty an amount equal to the amounts so collected. The director shall pay over to the affected employees the amounts collected including the penalty

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amounts collected. In any action in which the director prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where workmen are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for himself or any other person, shall request, demand, or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or

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understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The department of industrial relations shall enforce sections 4115.03 to 4115.16 of the Revised Code.

OHIO REVISED CODE

Section 4115.16. Complaints of violations; action upon.

(A) An interested party may file a complaint with the director of industrial relations alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. The director, upon receipt of a complaint, shall investigate pursuant to section 4115.13 of the Revised Code. If the director determines that no violation has occurred, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred.

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested

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party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed with him pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has

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occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code. Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

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(C) The director shall make available to the parties to any appeal or action pursuant to this section all files, documents, affidavits, or other information in the director's possession that pertains to the matter. The rules generally applicable to civil actions in the courts of this state shall govern all appeals or actions under this section. Any determination of a court under this section is subject to appellate review.

(D) Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may

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award court costs and attorney fees to the prevailing party, other than to the department of industrial relations or the public authority, where the court finds the action brought was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.